No. 82-1724

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

STATE OF NEW YORK,

Petitioner,

v.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

On Writ Of Certiorari To The
New York State Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL RIGHTS AND NATIONAL LAWYERS GUILD IN SUPPORT OF RESPONDENTS

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December 17, 1983

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The CENTER FOR CONSTITUTIONAL RIGHTS and the NATIONAL LAWYERS GUILD respectfully move for leave to file the attached brief amicus curiae in support of Respondents Robert Uplinger and Susan Butler and to urge affirmance of the judgment of the New York Court of Appeals which found New York Penal Law §240.35(3)

unconstitutional. People v. Uplinger, 58 N.Y.2d 936, 460 N.Y.S.2d 514 (1983).

The CENTER FOR CONSTITUTIONAL RIGHTS (CCR) is a non-profit legal and educational corporation founded in 1966 and is dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights. CCR, which filed a brief amicus curiae in the court below, has been involved with numerous cases involving the rights to freedom of speech, association and privacy--especially where interference with those rights is based on social disapproval of lifestyle or belief, e.g., Harris v. McRae, 448 U.S. 297, reh. den. 448 U.S. 917 (1980) (involving poor women's rights to non-discriminatory medicaid coverage for abortion), and Drew Municipal Separate School District v. Andrews, 507 F.2d 611 (5th Cir. 1975), cert. dismissed as improvidently granted, 425 U.S. 559

(1976)(securing the right of unwed mothers to retain teaching positions despite social disapproval).

THE NATIONAL LAWYERS GUILD (NLG), also amicus below, is an organization of nearly 8,000 lawyers, law students and legal workers dedicated to the goal of full equality for all people. Since its inception in 1937, the NLG has worked consistently for the advancement of the rights of poor and working people, women, racial minorities and groups striving for social justice. Its Gay Rights Task Force seeks to end discrimination against gay men and lesbians and has been involved in challenging anti-gay loitering and solicitation laws.

NLG and CCR also have a long history of opposing police practices which deprive individuals of their constitutional rights and they are concerned about the abusive and intrusive police

practices used against "suspected" homosexuals to enforce the statute at issue here.

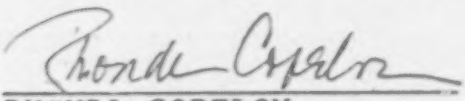
The attached brief of amici includes a history of the legal oppression of certain groups in our society by protecting public sensibilities at the expense of civil rights and liberties. The history of the notion that there is a proper place, out of sight, for those who are deemed offensive, is particularly appropriate to this case.

The amicus brief also highlights certain issues of first amendment and privacy rights and is unique in its examination of the gender-discriminatory character of the statute at issue.

Counsel for Petitioner has refused to consent to the filing of this brief,

while counsel for Respondents have consented.

Respectfully submitted,



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INTEREST OF AMICI

The interest of amici appears in the foregoing motion.

STATEMENT OF THE CASE

Because petitioner's statement of the case gravely distorts the record, amici

find it necessary to clarify the background at some length:

At 2:50 a.m. in the middle of a busy area of Buffalo similar to New York City's Greenwich Village (JA 36-37), Steven Nicosia, an undercover member of the Buffalo Police Department vice squad, was loitering to engage suspected homosexuals in conversation and to arrest them upon an explicit proposition for sexual activity. People v. Uplinger, 111 Misc.2d 403, 406, 444 N.Y.S.2d 373, 375 (Buffalo City Ct. 1981).

Robert Uplinger walked by and said "hi, how are you," People v. Uplinger, 111 Misc.2d at 406, 444 N.Y.S.2d at 375. The two men talked for approximately 10-15 minutes, during which time the undercover officer sought a number of times to elicit from Uplinger an explicit invitation to have sex:

> Mr. Uplinger walked up to me and began a conversation; it was just a brief conversation more or less to the extent of hellc, how are you, that type of thing. After a little bit of conversation the defendant asked me if I wanted to get high and I said no. He said, "well, what do you like to do?", and I said, "I don't know, what do you like to do?". This went back and forth for a minute or so.... Three of four other males came up to this 140 North Street which is the step of the Hotel Lenox, Mr. Uplinger introduced me to several of these males, just after that, this undercover police vehicle pulled up and told us all to get off the steps and leave the area of the hotel; we all left in separate directions, I walked west on North Street away from the hotel, Mr. Uplinger followed me and he asked me if I wanted to go to his place and again I asked him what he wanted to do and he said something to the effect, well do you want to come over. And I told him no... I told him, no, I'm scared with the police and I want to leave--I'm going to leave and he said, well if you drive me over to my place I'll blow you. (JA 104).

Uplinger was then arrested for violating Penal Law §240.35(3) which prohibits

loitering for the purpose of solicitation for "deviate" sexual intercourse.[1]

This fact pattern is typical of the manner in which Penal Law §240.35(3) is enforced. People v. Uplinger, 111 Misc.2d at 402, 444 N.Y.S.2d at 376.[2] According

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[1]"Deviate" sexual intercourse is defined in Penal Law §130.00(2) as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." (McKinney, 1975). The term "deviate" sex is used in this brief only because it is the language used in the statutes in question. Amici question whether the term "deviate" is appropriately used to describe sexual practices engaged in by the overwhelming majority of people, both heterosexual and homosexual, in this society and elsewhere. P. Blumstein and P. Schwartz, American Couples, 231-237 (1983).

[2]Until very recently, it has been enforced exclusively against purely noncommercial homosexual solicitations made in a discreet non-obtrusive manner (JA 61, 65,72-73,107, 111 Misc.2d at 405, 444 N.Y.S.2d at 375). The arrest of Butler and testimony at the hearing indicate recent use of the statute against female prostitutes in an effort

(Footnote Continued)

to a 15-year veteran of the vice squad, homosexuals are arrested under the statute only when they are alone with an undercover police officer (JA 61), and usually after about 10 minutes of conversation of a general nature (JA 65-66). The same officer could not remember even one instance where a passerby was within earshot of a suggestion for "deviate sexual intercourse," (JA 142), and admitted that the solicitations at which Penal Law §240.35(3) is directed can be easily

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(Footnote Continued)
to circumvent the decision in People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981). But commercial solicitation, a separate situation from that here, is dealt with by the entirety of article 230 of the Penal Law and by Penal Law §240.37 which outlaws loitering for the purpose of engaging in a prostitution offense. As implicitly conceded by the petitioner (Pet.Br. 19), use of the statute against Butler is an effort to avoid proving the commercial nature of a solicitation.

avoided by simply walking by when the initial "hi, how are you?" is uttered. (JA 74).

None of the testimony of the prosecution's six witnesses--three police officers, the owner of the Lenox Hotel, a local resident, and a nonresident Councilman--supports the conclusion that public harassment or nuisance results from the activities targeted by Penal Law §240.35(3).

The trial court made a number of assumptions about the character and dangers of homosexual solicitation that are unsupported by the record. Judge Drury hypothesized "[t]he real possibility that a man or his son may be solicited, harassed or confronted at the very door to his house." 111 Misc.2d at 409, 444 N.Y.S.2d at 377. But the record contains no evidence of unwanted,

noncommercial homosexual solicitation.[3] The vice squad was unable to produce any evidence of citizen complaints about homosexuals accosting or propositioning them for non-commercial sex (JA 79),[4] and the state's citizen witnesses testified that they had never been harassed, intimidated or even addressed by homosexuals, nor had they known of anyone in the neighborhood having been solicited

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[3]The record contains evidence of only one uninvited offer from a male prostitute, which the witness found offensive because it was unwanted, not because it was homosexual. (JA 59).

[4]While one officer testified as to the general receipt of solicitation complaints, (JA 30) he did not distinguish between commercial as opposed to non-commercial solicitations, a distinction which the city court judge found pivotal. 111 Misc.2d at 408, 444 N.Y.S.2d at 376. Another officer testified that he did not know of, had not received, and had not read any complaints of homosexuals accosting anybody the past summer (JA 79), but that he vaguely remembered "maybe two or three" (JA 79).

by a homosexual, 111 Misc.2d at 408, 444 N.Y.S.2d at 376, let alone overheard any offensive conversation between homosexuals (JA 35,46). The vice squad officers denied receiving or even hearing of any complaints involving solicitation of children (JA 111,79). The only indication of uninvited non-commercial solicitation in the record was an officer's hearsay reference to one woman's complaint that her teenage son had been solicited (JA 19-20,113).

The record thus contains no evidence that homosexual solicitation for consensual, non-commercial sex either intrudes into the privacy of individuals or constitutes a public nuisance. In addition, no violence (JA 46,67), noise (44) or litter (44) was associated with this activity. The record demonstrates that men on the street, whether homosexual or not, do not congregate in

large fearsome groups or impede pedestrian traffic, but rather are often solitary and never in groups larger than three or four. (JA 38,43,51,78).

In sum, the record presents no basis for the proscriptions of §240.35(3). Instead, it shows that intrusive and unacceptable police tactics are being consistently used to punish a disfavored group, homosexuals, and to deter them from exercising their rights. The only basis for the statute's existence and enforcement is what the trial court described as the "age old fear that people have of homosexuals." 111 Misc.2d at 408-09, 444 N.Y.S.2d at 377.[5]

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[5]The trial judge's active effort to create reasons to sustain the statute is further illustrated by examining his conclusion that "part of the opposition people have to [homosexuals] is due to the economic loss to businesses and to the value of their homes that occurs when

(Footnote Continued)

SUMMARY OF ARGUMENT

In its inception and application, Penal Law §240.35(3) is directed at homosexual solicitation based on a conclusive presumption drawn by the legislature that it is per se offensive and a public nuisance.

Amici examine first the historical precedents for such a presumption showing that the relationship between the legislature's effort to confine and stigmatize homosexuality today is an anachronism akin to the historic

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(Footnote Continued)
[solicitation activity] takes place in an area," 111 Misc.2d at 409, 444 N.Y.S.2d at 377, despite testimony that business in the neighborhood was not adversely affected by the homosexuals (JA 48, Freudenheim). Judge Drury had remarked during argument that the witnesses "were too sensitive and tolerant to show...that their property was losing its value...and there was a substantial chance that their businesses would be affected" (JA 95).

prejudice and exclusion directed against Blacks, women, and the poor who likewise diverged from social norms.

Point II demonstrates the unconstitutionality of the statute under the first amendment. As illustrated by Uplinger's and Butler's arrest, the statute is triggered by pure speech and establishes a conclusive presumption that the speech is sufficiently harmful and invasive to override the expressional values at stake. On its face, Penal Law §240.35(3) thus violates the requirement that content-based restrictions must be tested in the individual case to determine whether the context of the speech justifies suppression. On the record, it is also clear that the expression for which Uplinger and Butler were arrested cannot survive the scrutiny required by the first amendment.

Point III discusses the sex-discriminatory nature of the statute's content-based restriction. Despite the fact that women endure and have been traditionally expected to endure heterosexual solicitation for both "deviate" and non-"deviate" sex that is generally unwelcome, loud, sexually explicit, and abusive, the statute prohibits as per se intolerable and offensive, homosexual inquiry which is characteristically discreet, non-explicit, invited, and easily ignored. This gender discrimination not only fails the substantial relationship test of equal protection, but underscores as well the impermissibility of the statute under the first amendment since the treatment of women makes clear that a far greater level of annoyance or offensiveness must normally be endured in public arenas.

Point IV examines the underinclusiveness and overinclusiveness of the statute, which further confirms that, at the root, the statute is directed against homosexuals, due not to the offensiveness of their solicitations, but to subjective apprehension for the "age-old fear" stirred by the presence of homosexuals in public.

Point V demonstrates that the solicitations at issue, far from being offensive per se, are shielded under the first and fourteenth amendments since the right of privacy and associational freedom necessarily entails public speech.

ARGUMENT

POINT I

PENAL LAW 240.35(3) PERPETUATES DISCREDITED MORALISTIC PRESUMPTIONS REMINISCENT OF THOSE USED TO DEGRADE AND EXCLUDE BLACKS, WOMEN AND THE POOR

Penal Law §240.35(3) and the petitioner's assertion in this case that solicitation for "deviate" sex is patently offensive is a thin veil for impermissible prejudice against homosexuals. History teaches that this is the latest in a long and unfortunate line of moralistic proscriptions against those whose identity, lifestyle and/or intimacies are divergent from societal norms.

Under the guise of public morality and the protection of a well-ordered society, discrete groups have been told, often with the approval of the courts, to remain out of sight or in their "proper place". Lest this Court be intrigued into the same error, amici preface this brief with a few examples of previously sanctioned proscriptions which highlight the dangers and shortsightedness of enshrining prejudice into law. Mere

offense, distaste, or personal morality are unacceptable grounds upon which to restrict individuals in the exercise of important rights. Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971).[6]

Racial Inferiority and Separation

The brutal system of slavery and the denial of citizenship to Blacks was rationalized by moral right and necessity. As Chief Justice Taney so

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[6]The drafters of the Model Penal Code assert that statutes like §240.35(3) are not based on "private morality" but seek only to suppress "public nuisance." However, the drafters speak not of actual, concrete harm but only of the "flout[ing] of community standards;" the "affront to moral and aesthetic sensibilities;" and "annoyance." (Pet.Br. at 14 citing Model Penal Code, §251.3, Comment, at p. 476). Such phrases have long reflected the use of prejudice, stereotype and personal views of morality to justify oppression of minority groups. R. Abrams, Attorney General, Speech at New York University School of Law, reprinted in 5 Sex L. Rep. 21 (1979).

candidly and cruelly explained, Blacks "had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations....It was regarded as an axiom in morals as well as in politics, which no one thought of disputing..." Scott v. Sandford, 19 How. 393, 15 L.Ed. 691, 701 (1857).

Laws forbidding the marriage of whites and Blacks were jealously guarded on the ground that intermarriage was harmful to "good citizenship" and would adversely affect the "morals and civilization of a people." Naim v. Naim, 197 Va. 80, 86-88, 87 S.E.2d 749 (1955), appeal dismissed, 350 U.S. 985 (1956). In 1967, when this Court finally struck down such statutes, 16 states still punished miscegenation, apparently still believing that the downfall of

civilization would occur if intimacy between blacks and whites were permitted legitimation. Loving v. Commonwealth of Virginia, 388 U.S. 1 (1967). See also McLaughlin v. Florida, 379 U.S. 184 (1964).

Women's "Place"

The categorical prohibition against women entering and remaining in bars has a familiar ring: "That injury to public morality would ensue if women were permitted without restrictions to frequent wine rooms, there to be supplied with liquor, is so apparent to the average person that argument to establish so plain a proposition is unnecessary." Adams v. Cronin, 29 Colo. 488, 69 P. 590, 593 (1902), aff'd 192 U.S. 108 (1904). See also Goesaert v. Cleary, 335 U.S. 464, 466 (1948). Similarly here, petitioner considers the subject matter of Robert Uplinger's speech to be so

"undeniably lewd" (Pet.Br.8), and the injury to public sensibilities to be so manifest that no genuine evidence of concrete harm has been presented. See Point II, infra.

Bradwell v. Illinois, 83 U.S. (16 Wall.) 130,141 (1873) (Bradley, J., concurring) is often cited for its classic view that females have a "natural and proper timidity and delicacy" which "evidently unfits [them] for many of the occupations of civil life." For such reasons, women were, until 1850, excluded from teaching,[7] and thereafter married women were widely excluded based on sentiments about their morally damaging and hazardous influence on school

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[7] R. Callahan, An Introduction to Education in American Society, 383-84 (1956).

children.[8] The prohibition on married women teaching gave way to forced maternity leaves,[9] which this Court viewed as designed in part to insulate school children from conspicuously pregnant women. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 641 n.9, 644-45 (1974). And recently, the Court has invalidated a variety of statutes on the basis that "[n]o longer is the female destined solely for the home and the rearing of family, and only the male for the marketplace and world of ideas." Stanton v. Stanton, 421 U.S. 7, 15 (1975), cited in Craig v. Boren, 429 U.S. 190, 198-99 (1976).

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[8] I. Woody, A History of Women's Education in the United States, 509, 513 (1966); C. Atkinson and E. McLeska, The Story of Education, 346-47 (1965); Donovan, The School Ma'am, 57 (1938).

[9] Brief Amicus Curiae for the

(Footnote Continued)

Vagrancy

"Tramps," persons without homes or jcbs, found wandering in a town have also been viewed as undesirables and therefore guilty of criminal conduct per se. Vagrancy statutes, such as that declared void by this Court in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) were at one time thought of "...as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds..." City of New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837). The vagrancy laws served to secure the banishment of disfavored groups. Papachristou v. City of Jacksonville, 405 U.S. at 170. See also Edwards v. California, 314 U.S. 160,

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(Footnote Continued)
National Education Association et al., in Cleveland Board of Education v. LaFleur, Sup. Ct. No. 72-777, at pp. 10-14 (1972).

177 (1941); Harring, Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894, 1977 L. & Soc'y Rev. 873.[10]

Virtually any group which is considered a "moral pestilence" or acting in an "offensive" manner can be described as creating a public nuisance. But particularly where no harm can be shown which rises above that "existing only in the mind of the beholder," L. Tribe, American Constitutional Law §15-19, at 981 (1978), fundamental freedoms cannot be restricted.

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[10]The Buffalo police department, responsible for the arrests of Uplinger and Butler, is the subject of an historical work describing control of "public order crimes" such as frequenting dance halls which were viewed as objectionable and immoral in the early 20th century. These crimes were seen as an effort to control the lifestyle of the working classes. See S. Harring, Policing a Class Society, 182-200 (1983): "The Buffalo police fully intended to socialize Buffalo's Italian community to 'proper American values." Id. at 199.

Like the laws enforcing racial inferiority, relegating women to a separate sphere, or excluding tramps from the streets, Penal Law §240.35(3) is a classification resting only on personal notions of morality, prejudice and stereotype. The lower court's view that "the appearance of homosexuals outside homes reinforces the age-old fear that people have of homosexuals and renews the offense they take at their activities," People v. Uplinger, 111 Misc.2d at 408-09, 444 N.Y.S.2d at 377, should be buried along with other infamous prejudices that this Court has rejected. It symbolizes

> [a] mindless hysteria [which] has all too often taken over the legislative and electoral forums, a hysteria that is based on and fueled by people's ignorance and fear of those who are different....The state clearly has a legitimate interest in protecting its citizens from violence and other clearly defined harm....But justifications for discrimination against lesbians and gay men which are based on personal

> sensibilities, prejudices, religious dogma, or unsubstantiated, unfounded and false presumptions are not compelling....[The] right to live one's life unhindered no matter how controversial or conventionally unacceptable that life style...is a central issue for racial, ethnic, and religious communities and for women. Intense opposition to all of these groups often focuses on the right of individual members to make personal life style decisions unacceptable to the majority....The underlying arguments...are that the social fabric of the country would be destroyed by legitimizing unstereotypical behavior or lifestyles. And the opposition to lesbian and gay men is ultimately based on a prejudice against a particular life style decision.

Speech, Robert Abrams, Attorney General of the State of New York, 5 Sex. L. Rptr. 21, 26 (1979)(emphasis added).

The petitioner's unsupported claims of harm to children, injury to businesses, embarrassment, discomfort, agitation and annoyance are based only on prejudices, rather than on the facts of clearly defined harms that Abrams recognizes as necessary to criminalize speech and associational activity.

> Whatever the purported justification for despising homosexual persons, the imposition of criminal penalties based upon public sentiment abandons the commitment found in the Constitution to preserving the rights of minority populations.

Comments, Human Rights in an International Context: Recognizing the Right of Intimate Association, 43 Ohio St. L.J. 143, 152 (1982). See also McLaughlin v. State of Florida, 379 U.S. 184, 192 (1964).

POINT II

PENAL LAW §240.35(3) IS A CONTENT-BASED PROSCRIPTION OF SPEECH BASED ON AN UNFOUNDED AND IMPERMISSIBLE PRESUMPTION OF OFFENSIVENESS IN VIOLATION OF THE FIRST AMENDMENT

Penal Law §240.35(3) punishes pure speech based on the content of the speech simply because it occurs in a place frequented by the public. The fact that Uplinger was arrested not for remaining or wandering about in a public place, nor for inviting the undercover policeman "to

get high," People v. Uplinger, 111 Misc.2d 403, 406, 444 N.Y.S.2d 373, 375 (Buffalo City Ct. 1981), but only after he uttered certain words, makes clear that it was the content of his speech not his conduct which violated the law. See Cohen v. California, 403 U.S. 15, 18 (1971). Solicitation is a form of speech long protected under the First Amendment. See Schaumburg v. Citizens for a Better Environment, 444 U.S. 620,628-634 (1980); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Thomas v. Collins, 323 U.S. 516 (1945); Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939).

The state argues that the statute is permissible because the speech involved--a solicitation betweeen unmarried people for oral or anal sex--is not protected under the first amendment. This Court is asked to hold that mere

utterance of certain sexually explicit words in public is per se offensive to community standards and a public nuisance irrespective of whether the circumstances amount to harassment, intimidation or disorderly conduct, whether the solicitee is unwilling, or whether any potentially offended individual overhears or is likely to overhear the solicitation.

The state appears to make two arguments: first that the speech involved is so worthless as to be unprotected; second that the harm to the public is so ineluctable and severe that a blanket prohibition is justifiable. Both must be rejected if first amendment values are to be preserved.

A. The Sexual Solicitation At Issue Is Protected Speech

First, the state fails to demonstrate that this speech is categorically unprotected. It cannot be

prohibited as valueless. Winters v. People of New York, 333 U.S. 507 (1948). Nor can it be prohibited as solicitation of criminal activity since oral sex among unmarried persons was not illegal in New York when the defendant was arrested.[11] Neither is it unworthy of protection because it involves a personal as opposed to a political exchange. Connick v. Meyers, __ U.S.__, 103 S.Ct. 1684, 1690

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[11]This Court has so far declined to address the constitutional merits of criminalizing sodomy. See People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), cert. denied, 451 U.S. 987 (1981); Doe v. Commonwealth's Attorney, 403 F.Supp. 1199 (E.D. Va. 1975) aff'd without opinion, 425 U.S. 901 (1976). Whether or not this Court agrees with the New York Court of Appeals decision in Onofre is irrelevant here since the sexual conduct which Uplinger solicited was legal at the time of his arrest. Moreover, the validity of the Onofre decision is not challenged by the state here and should not be addressed by this Court given the absence of a record or determination below on this issue.

(1983). Merely because speech concerns what was traditionally viewed as "deviate" sexual conduct does not render it per se unprotected. Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962).

The state's position ignores the consistent teaching of this Court that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, it subject matter, or its content...." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). In regard to more obtrusive or intrusive forms of speech than involved here, the Court has refused to countenance blanket content-based restrictions such as the one at issue. "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Police

Dep't of Chicago v. Mosley, 408 U.S. at 96 (1972). See also Widmar v. Vincent, 454 U.S. 263 (1981); Carey v. Brown, 447 U.S. 455 (1980); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).[12]

B. The First Amendment Precludes the Categorical Presumption of Offensiveness At Issue Here

As the dissenting Judge in the Court of Appeals, People v. Uplinger, 58 N.Y.2d 936, 940, 460 N.Y.S. 2d 514, 516 (1983) and the petitioner in its brief (Pet.Br.18) state, Penal Law §240.35(3) reflects a legislative presumption that solicitation for "deviate" sex is

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[12] Indeed, the Court has prohibited content-based restrictions on speech, and other unreasonable regulations, even when the privacy of the home is at stake. See, Carey v. Brown, 447 U.S. 455 (1980); Hynes v. Mayor of Oradell, 425 U.S. 610 (1976); Martin v. Struthers, 319 U.S. 141 (1943).

patently offensive.[13] It requires neither scienter nor the demonstration of any harm, in the form of harassment, intimidation, disorderly conduct or breach of the peace before a conviction can be obtained. Indeed, as such, it violates the consistent teaching of this Court that pure speech--however offensive or frightening in itself--cannot be punished without examining the context in which it arises and the consequences it entrains.

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[13]Petitioner cites to a staff report considering revision of the New York Penal Law to prohibit solicitations to engage in both "deviate" and "normal" sexual acts. The committee viewed all such solicitations as "unsalutary or unwholesome from a social viewpoint." The state cites no authority to support its unfounded assertion that the legislature intended to limit the final act to solicitation for "deviate" sex because it is extra obtrusive, (Pet. Br. at 27), or to counteract the indication that the solicitation was criminalized merely because it was viewed as "unsalutary or unwholesome."

"The question in every case is whether the words used are used in such circumstance and are of such a nature as to create a clear and present danger that they will bring about the substantive evils [the legislature] has a right to prevent." F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745 (1978) citing Schenk v. United States, 249 U.S. 47, 52 (1919). See also Police Dep't of Chicago v. Mosley, 408 U.S. at 101.

The need for individualized judicial determination as to whether the speech presents a sufficient degree of harm to justify suppression--a determination completely bypassed by Penal Law 240.35(3)--applies regardless of judicial or legislative attitudes toward the value of the speech involved. "Fighting words" are unprotected because they are uttered under circumstances likely to cause a breach of the peace. Chaplinsky v. New

Hampshire, 315 U.S. 568 (1942). Thus in Cohen v. California, the Court looked carefully at context rather than allow "one particular scurrilous epithet" to be excised from public discourse either because it was inherently likely to cause a violent reaction or because it offends the public morality. 403 U.S. 15, 22 (1971). Likewise advocacy of violence can only be suppressed when it is done in a context that constitutes "incitement to imminent lawless action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Here, the record reflects no more than an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression." Cohen v. California, 403 U.S. at 23, citing Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 508 (1969).

Even the determination that speech is obscene and, therefore, unprotected, results from a case by case determination, not from legislatively drawn presumptions. See Miller v. United States, 413 U.S. 15 (1973).[14] Similarly, public displays of nudity are not categorically impermissible. See Erznoznick v. City of Jacksonville, 422 U.S. 205, 208 (1975). Surely, it is long past the day when it can be argued that public expression involving sexuality--even "deviate" sexuality--is

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[14] New York v. Ferber, __ U.S. __ , 102 S.Ct. 3348 (1982) upheld a prohibition on speech because the statute, drawn narrowly to protect children, was based on a factually supported determination that the "evil...so overwhelmingly outweighs the expressive interests." 102 S.Ct. at 3058. Here, the petitioner's claim to be protecting children from solicitation directed at grown men is mere bootstrapping. Other statutes do protect minors, both male and female, from sexual abuse by adults.

patently or presumptively obscene or offensive.[15]

Petitioner's effort to invoke the captive audience doctrine makes a mockery of the exception. The record makes clear that an unwilling passer-by can discourage a solicitation simply by refusing to respond to the salutation "hi" and that even a more explicit sexual suggestion can be likewise ignored.[16]

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[15]Of particular relevance to this case is the Court's 1962 ruling in Manual Enterprises, Inc. v Day, 370 U.S. 478 (1962), which refused to treat as per se offensive photographs of male nudes which were found to appeal to the prurient interest of homosexual men.

[16]An empirical study of homosexual solicitation found that solicitations are generally extremely discreet. They are usually made by quiet conversation and gesture. When undercover police agents are used to make arrests, their partners are unable to get sufficiently close to witness the solicitation. Note, The Consenting Adult Homosexual and the Law: Empirical Study of Enforcement and Administration in Los Angeles County, 13 U.C.L.A. L. Rev. 643, 695 (1966).

There is absolutely no evidence, as the state contends, that an unwilling solicitee is forced to respond. Unwilling solicitees are not like riders of a bus, Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), but rather like the "passer-by who may be offered a pamphlet in the street but cannot be made to take it." Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

Petitioner is reduced to the absurdity of claiming that the mere need to avoid an unwanted proposal or the "bother or genuine disturbance [felt by] those [claimed to be] involuntarily cast into the position of having to overhear them" (Pet.Br. 15-17) renders a person captive.[17]

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[17]The argument is no more applicable to Butler's waving to passing cars than to Uplinger's discreet inquiries.

This is a far cry from the circumstances which have been held to constitute captivity, rendering one "practically helpless to escape this interference with...privacy." Kovacs v. Cooper, 336 U.S. at 87. Unlike F.C.C. v Pacifica, 438 U.S. 726 (1978), where the Court emphasized the uniquely pervasive qualities of the broadcast media, its ability to invade the home, the time of day and resulting likelihood of exposing children to the offensive language, and the use of repetition to shock the listener, the statute at issue completely ignores the context of the solicitation. 438 U.S. at 748-750.[18] Cf. Rosenfeld v. New Jersey, 408 U.S. 901 (1972)(Powell, J., dissenting).

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[18]Genuine harassment of a person who wishes to be left alone in a public place such as a park is punishable under other

(Footnote Continued)

The state purports to protect the privacy rights of the public on the streets. But the rare, avoidable, and unwanted inquiry suppressed by this statute is far from the intolerable invasion of privacy required to restrict speech and associational rights in public. Cohen v. California, 403 U.S. 15 (1971); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Hess v. Indiana, 414 U.S. 105 (1973).

Petitioner asserts that the state has a "compelling interest" in prohibiting the expression here because it constitutes a "public nuisance" inimical to the character of the neighborhood and successful business.

(Footnote Continued)
statutes. See e.g., N.Y. Penal Law §240.25 (McKinney 1980); N.Y. Penal Law §240.20 (McKinney 1980).

(Pet.Br. 20).[19] But this Court has stressed that a claim of "nuisance," given its breadth and potential to suppress and sanitize public life, requires careful examination of the context of expression. F.C.C. v. Pacifica Foundation, 438 U.S. 726, 750(1978); cf. Young v. Mini Theatres, 427 U.S. 50 (1976).

Mere assertions of offensiveness, moral disgust, or, at best, slight inconvenience--which is all the record in this case indicates--do not represent the careful analysis of the context which is required. Nor do they meet the test of intolerability and substantial invasion of privacy. First amendment values cannot be protected unless people are required to endure some offensive conduct

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[19] See supra fn. 5 at 9.

on the street, and to bear some burden of avoiding the distasteful.[20] The first amendment thus requires, at the least, case-by-case determination which is completely bypassed by Penal Law §240.35(3).[21] For this reason, the

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[20] Point III, infra, discusses the gender discriminatory character of this statute in light of the fact that women are expected to endure far more sexually explicit, intrusive, abusive, unavoidable, and often threatening overtures from heterosexual men than anything suggested by this record. This only underscores that the alleged offense involved here is well within the scope of tolerability.

[21] It is furthermore clear that neither Uplinger's nor Butler's solicitation is punishable consistent with first amendment values. Uplinger's discreet inquiry occurred only after Nicosia had indicated, albeit falsely, that he was receptive. Butler was arrested for "waving to passing motorists during the early morning" after she was later found engaging in oral sex in a parked car. People v. Uplinger, 111 Misc.2d 876, 449 N.Y.S.2d 916, 919 (1982). There is no allegation that she was using sexually explicit language, nor that she impeded the ability of the cars

(Footnote Continued)

statute was and should be properly invalidated on its face.[22]

(Footnote Continued)
to avoid her overtures, nor that her solicitation had otherwise offended anyone. Indeed, petitioner virtually admits that it was her status as a "known prostitute" that led to her arrest and that Penal Law §240.35(3) was employed to circumvent the difficulty of proving the exchange of money essential to prosecution under the prostitution statutes. (Pet.Br.19). Moreover, it appears, as the lower court found, that §240.35(3) has been employed against prostitutes only since the Onofre decision to shield its anti-homosexual character and application. People v. Uplinger, 111 Misc. 2d 373, 404, 444 N.Y.S. 2d 373, 374 (Buffalo City Ct. 1981). For all these reasons, the statute is invalid as applied to respondent Butler.

[22] Indeed the clear unconstitutionality of this statute and the unanimity of the state courts on the impermissibility of punishing non-criminal solicitation, Pryor v. Municipal Court of Los Angeles, 25 Cal.2nd 238, 599 P.2d 636 (1979); Commonwealth v. Sefranka, 414 N.E.2d 606 (Mass. 1980); Pederson v. City of Richmond, 219 Va. 1061, 254 S.E.2d 95 (1979); Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973); Oregon v. Tusek, 52 Or. App. 997, 630 P.2d 892 (1981), even suggest the appropriateness of dismissing

(Footnote Continued)

POINT III

PENAL LAW §240.35(3) CONSTITUTES A GENDER-BASED SUPPRESSION OF SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

While petitioner purports to deal with the underinclusiveness of Penal Law §240.35(3), he fails even to mention the gender-based discrimination effected by the statute. (Pet.Br.25-29). The claim that discreet homosexual solicitation is a patently offensive and intolerable invasion of the substantial privacy rights of individuals on the street establishes protection for men that has been traditionally denied women.

Solicitation of women for both "deviate" and non-"deviate" sex by

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(Footnote Continued)
the writ of certiorari as improvidently granted. See Phillips v. New York, 362 U.S. 456(1960); Baldonado v. California, 366 U.S. 417(1961).

heterosexual men is a commonly accepted practice:"...[T]he mere solicitation of illicit sexual intercourse from a woman is quite uniformly held not to amount to an assault." W. Prosser, Handbook of the Law of Torts, §10 n.20, at 40 (4th ed. 1971) (citations omitted).

Known as the doctrine of "no harm in the asking," this statement reflects prevailing tort principles governing purely verbal unwanted sexual invitations to females. By contrast, Penal Law §240.35(3) makes the asking criminal where the recipient is a man. It is ironic indeed that despite the ruggedness stereotypically assigned to the male in most areas of human endeavor, here the sensibilities and fears of men or their desire to be let alone are deemed in need of protection, while the stereotypically

fragile female is denied the same.[23] The constitutionally protected interest in personal privacy in these matters is obviously no greater for men than for women, and surely men can be deemed no less capable than women of ignoring solicitation or saying "no."

Nothing in the character of homosexual versus heterosexual solicitation justifies criminalizing the former and not the latter. While amici consider unwanted verbal solicitations of women short of harassment to be constitutionally protected albeit

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[23] See, e.g., Bradwell v. Illinois, 83 U.S. 130 (1872); Goesaert v. Cleary, 335 U.S. 464 (1948); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981); and compare, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Stanton v. Stanton, 421 U.S. 7 (1975); Craig v. Boren, 429 U.S. 190 (1976).

annoying activity,[24] the facts demonstrate that homosexual inquiries are far less intrusive than heterosexual, non-"deviate" ones. Supra fn. 16.

The sexually explicit verbal harassment of women in public is ubiquitous.[25] These remarks--which are so frequent that hardly a woman or teenage girl has escaped them--certainly deserve judicial notice.[26] The abuse is

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[24]Educational efforts may be desirable to reduce the social acceptability of unwanted verbal assaults on women; this is clearly not the business of the criminal law.

[25]Sexual abuse of this kind occurs everywhere in situations where the woman is clearly not interested in a sexual liaison with the harasser: jogging through the park, shopping in an upper class neighborhood, walking to work in the morning. See generally, Gardner, Passing By: Street Remarks, Address Rights and the Urban Female, 50 Sociological Inquiry 328 (1980).

[26]The litany is endless: "Hey, baby, want to fuck?", "Nice tits. Can I have

(Footnote Continued)

often loud and persistent, even when a woman has indicated her lack of interest or anger, Gardner, supra n. 25 at 346; Shear, Free Meat Talks Back, 26 J. of Comm. 38-39 (1976), and frequently conducted by groups of men, Gardner, supra n. 25 at 343, 348; King, The Good Ole Boy: A Southern Belle's Lament, Harper's Mag., April, 1974, at 78. It addresses the perceived physical characteristics of the woman, often commenting negatively or obscenely on a woman's appearance, Gardner, supra n. 25 at 333; Tax, Woman and Her Mind: The Story of Everyday Life, in Radical Feminism 23, 28 (1973). The remarks may

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(Footnote Continued)
one?", "Look at that ass", "Come on, give me some." Women also commonly experience equally offensive solicitations for "deviate" sexual activity. The offense inheres, however, not in the particular sexual act described, but in the non-consensual nature of the verbal assault.

be vicious, especially if the woman refuses to respond or responds negatively, Gardner, supra n. 25 at 333; D. Russell, The Politics of Rape 168 (1975); Shear, supra; Tax, supra, at 28, and occur in a context of male violence against women. [27]

Thus, in terms of public nuisance, or offensiveness to the individual in public, heterosexual solicitation of women is distinguishable from homosexual solicitation of men only by being worse. There is absolutely no rationality to protecting men in a context where women are not protected, let alone a substantial relationship to the

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[27] See generally S. Brownmiller, Against Our Will (1975); C. MacKinnon, Sexual Harassment of Working Women (1979); D. Russell, The Politics of Rape (1975); L. Walker, The Battered Woman (1979); Burt & Estep, Apprehension and Fear: Learning a Sense of Sexual Vulnerability, 7 Sex Roles 511 (1981).

achievement of an important governmental objective. See Mississippi University for Women v. Hogan, __U.S.__, 102 S.Ct. 3331 (1982). Moreover, in the context of content-based restrictions, underinclusiveness destroys the presumption of statutory validity. See Erznoznik v. City of Jacksonville, 422 U.S. at 215.

Most importantly, the absence of any penalty on unwanted solicitation of women by heterosexual men for both non-"deviate" and "deviate" sexual activity [28] demonstrates that the purpose

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[28] It should also be noted that although Penal Law §240.35(3) is theoretically susceptible of application against heterosexual male solicitation for "deviate" sex to non-spouses, the record fails to indicate any such application. Moreover, even this theoretical possibility cannot cure the facial discrimination in a statute which fails to address unwanted heterosexual non-"deviate" sexual solicitation.

of suppression here is not to protect against intolerable affront or public nuisance, but rather to punish and stigmatize homosexual men for their sexual orientation and subject them to intolerable invasion of privacy through prying and deceitful police tactics.

POINT IV

PENAL LAW §240.35(3), ON ITS FACE AND AS APPLIED, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT IN THAT IT DISCRIMINATES AGAINST HOMOSEXUALS BASED ON THEIR STATUS AND NOT ON CONDUCT WHICH IS INJURIOUS TO OTHERS.

It is clear that, by origin and application, Penal Law §240.35(3) is directed to homosexual solicitation for non-commercial sexual activity. Its predecessor, Penal Law §722(8), also prohibited "soliciting," which was construed as "the asking, urging or importuning of a man or men to commit a

degenerate act," People v. McCormack, 9 Misc.2d 745, 747 (N.Y.Ct.Spec.Sess. 1957). This definition was applied to §240.35(3) when it was sustained by a lower court in People v. Willmott, 67 Misc.2d 709, 712 (N.Y.Justice Ct. 1971).

Prior to People v. Onofre, Penal Law §240.35(3) was enforced only against homosexuals. In Uplinger, the city court found that the recent effort, represented by the Butler case, to apply it to heterosexual solicitation, is "an attempt to circumvent the effect of the Onofre decision." People v. Uplinger, 111 Misc.2d 403, 404, 444 N.Y.S.2d 373, 374 (Buffalo City Ct. 1981).[29] Thus, this

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[29]While amici do not accept that the commercial nature of a sexual exchange justifies criminalization of prostitution or solicitation regarding it, that is not the issue in this case. The issue here is rather the validity of applying §240.35(3) to conduct for which it was

(Footnote Continued)

law is directed at non-commercial sexual solicitation by homosexuals.

As the record shows, the character of homosexual solicitation with respect to the possibility of an unwanted approach to a stranger, or offense to public morality or sensibility, does not justify the distinction beteween homosexual and heterosexual solicitation. Section §240.35(3) is not on the books because unreceptive men are being approached or because bystanders are being subject to overhearing explicit

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(Footnote Continued)
not intended and for the purpose of punishing the status of appearing to be a prostitute notwithstanding that the crucial commercial exchange cannot be proven. (Pet. Br. 19) That ample laws exist to control the offense of prostitution only underscores that the target of this statute is homosexuals. See Penal Law §230.25(loitering for solicitation for prostitution), §240.20 (disorderly conduct), §230.25 (harassment) and §100 (solicitation for criminal conduct).

sexual discussion.[30] The offense to the public complained of by petitioner is equally "committed" by two homosexual men talking softly on the street about politics as it is by the speech that triggered Uplinger's arrest.

Moreover, if the law were genuinely concerned with unwanted or offensive solicitation, then it would not apply to public places such as gay bars, restaurants and other public places where homosexuals and their friends go with the

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[30]Petitioner's effort to justify the exclusion of married couples from the statute further demonstrates that it is based not on the type of sex but on the appearance of those discussing it. While it is true that a solicitation between spouses cannot involve a stranger, it can be overheard by strangers just as easily as a homosexual interchange. Indeed, just as heterosexuals are far more physically sexual with one another in public than are homosexuals, so also it is predictable that spouses might discuss their sexual desires with less caution about being overheard.

expectation that solicitation is a normal part of social intercourse, and where there is no "public" capable of being offended. The city court, however, made clear that direct offense is irrelevant because of the most amorphous notion that offense attaches "wherever it occurs." People v. Uplinger, 111 Misc.2d at 409, 444 N.Y.S.2d at 377.

Finally, if the law were genuinely concerned with unwanted solicitation, then enforcement practices would be considerably different. Rather than setting up decoys whose job it is to elicit invitations for explicit forms of "deviate" sexual activity, enforcement would be oriented toward spotting the actually undesired solicitation and questioning the seemingly offended party. Given the discretion with which these solicitations are conducted by the homosexual community on North Street,

however, it is obvious that such a scenario would be rare indeed and would not warrant the law enforcement effort required.

Upon analysis, the law emerges as nothing more than an effort to punish the status, the appearance on the street, and the social intercourse of homosexual men. Stripped to its essentials, this statute impermissibly punishes a group because their intimacies and life-styles are offensive to some members of the public. Coates v. City of Cincinatti, 402 U.S. 611, 615-16 (1971); U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973)[31].

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[31]By contrast, if singles bars and beaches were infiltrated by undercover officers who snared heterosexuals engaged in the process of finding lovers, public outcry would be deafening, bearing out the truth of Justice Jackson's reminder that "there is no more effective

(Footnote Continued)

POINT V

PENAL LAW §240.35(3) INFRINGES THE FUNDAMENTAL RIGHT TO MAKE PERSONAL DECISIONS ABOUT PRIVATE CONSENSUAL NON-COMMERCIAL SEXUAL ACTIVITY AMONG ADULTS

Amici rely on the arguments of respondents and other amici, which--although not necessary for the resolution of this case--assert that consenting adults are protected from unwarranted government intrusion into their right to make decisions about private sexual conduct. Griswold v. Connecticut, 381 U.S. 479 (1965). In addition, amici note that this right of privacy has certain public aspects that are also protected. See Carey v.

(Footnote Continued)
practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally," Railway Express Agency v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Population Services Int'l., 431 U.S. 678, (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809, (1975).

If public commercial advertising of matters related to protected sexual intimacies--viewed as "obscene" and "offensive" by some--is protected, then, a fortiori, discreet, individualized inquiry to ascertain interest in establishing a non-commercial, consensual sexual relationship is well within the scope of the constitutional right to privacy. "This is so not because there is an independent fundamental 'right of access [e.g.] to contraceptives,' but because such access is essential to the exercise of the constitutionally protected right of decision...." Carey v, Population Service Int'l. 431 U.S. at 688.

If homosexuals or, theoretically, unmarried heterosexuals are to be denied the right of social intercourse when they are on the public streets, on public property, or in places of public accommodation, as Penal Law §240.35(3) provides, then the right to engage in private in constitutionally protected consensual sexual activity will be severely burdened. To so limit the ability to form human and sexual relationships is no less unconstitutional than a complete prohibition on the protected conduct. Carey v. Population Services, Int'l., 431 U.S. at 689-90.

The damage done to the right of privacy by §240.35(3) is underscored by the particularly intrusive methods adopted by the police to enforce its prohibition. The statute gives the police license to target "suspected homosexuals," spy on their peaceful

activities and delve into highly intimate, personal areas of their lives. The police are not passive, but engage in activity designed to lead individuals to reveal their sexual preference generally as well as their interest in specific sexual practices. Similar police practices have been described as

> "mock[ing] the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called 'wayward' life....More importantly, the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy." State v. Saunders, 75 N.J. 200, 220 (1977). See also Griswold v. Connecticut, 381 U.S. at 485-86.

Here, respondent Uplinger may have been speaking with a complete stranger on the street, but he was entitled to feel assured that he was not divulging intimate details about his life to a government agent.

> Intimate human relationships depend largely on the sense that the participants are free from the observations of others, and that

> sense is essential to the development of individual points of view and modes of life. Continuing contacts with those looking for damaging information are both highly unpleasant and disturbing to any sense of security.

People v. Collier, 376 N.Y.S.2d 954, 982 (N.Y. Sup. Ct. 1975) (quoting Prof. Kent Greenawalt in The Right of Privacy, in The Rights of Americans, 300).

Unlike the quite tolerable minor invasion of privacy which in theory might result from an undesired sexual solicitation, the invasion of privacy resulting from police spying into intimate aspects of human relationships is far more injurious and intolerable to the individual and in fact to the health and well-being of our entire society.

CONCLUSION

For all the foregoing reasons, Penal Law §240.35(3) must be invalidated on its face and as applied.

RESPECTFULLY SUBMITTED,

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December 17, 1983